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DISCUSSION KICK-OFF

# Blackmarketing "Bundeswehr" Weapons in Northern Iraq:

## Applying a Due Diligence Approach to Arms Transfers?

ELIF ASKIN — 25 July, 2016



In September 2014, the German army started shipping weapons from its own stocks to the security forces of the Kurdish autonomous region in Northern Iraq (Peshmerga) to support the fight against the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh). Strong reservations arguing that these weapons might end up in the wrong hands and likely be used to commit human rights violations were voiced, especially considering that ISIL has acquired most of its military equipment by capturing it from existing

stockpiles and black markets in Iraq and Syria (SIPRI Yearbook 2015, Part I, 2.III., p. 49). To a large extent, therefore, it may not come as a surprise that weapons engraved with the letters "bw", which stands for "Bundeswehr", were discovered on offer in black markets in the mountains of Northern Iraq. In response to these developments, the German Federal Ministry of Defence explicitly shirked responsibility by holding the Kurdish Regional Government (KRG) responsible for the whereabouts of the arms, and declared that the weapons transferred by Germany have been used in accordance with international law (see e.g. here).

Traditionally, the legality of arms transfers – understood as non-commercial transfers of conventional weapons initiated by States in the form of military aid to foreign governments or non-state actors – has been treated as a question governed exclusively by arms control law. More recently, however, international human rights law has increasingly been attracting attention as a source of restrictions of arms transfers. Nevertheless, the argument for the normative relevance of human rights for arms transfers is obviously a difficult one to make, especially as it concerns its applicability beyond the transferring State's borders. This blog post argues that the *due diligence obligation to prevent* human rights violations has the potential to fill this lacuna when seeking to protect human rights in the context of arms transfers.

**The bindingness of international human rights treaties with respect to arms transfers**

Under the law of state responsibility, the supply of weapons might indeed trigger responsibility for "extraterritorial

complicity" – in this regard the above-mentioned statement by the German Federal Ministry of Defence cannot be considered proper legal reasoning. Then, the transferring State may have committed an *internationally wrongful act* through the provided weapons ("aid or assistance") that are used to commit human rights violations (see article 16 of the ILC Draft Articles on State Responsibility), even if the transfer is lawful according to national regulations (see Bellal, Arms Transfers and International Human Rights Law, in Casey-Maslen (ed.), Weapons under International Human Rights Law, p. 451).

Against this backdrop, the key question to be answered is whether international human rights treaties put supplier States under any obligations with regard to arms transfers to foreign governments or non-state actors that end up with intended or non-intended end-users who misuse them or are likely to do so. Accordingly, in cases where the transferring State might be found responsible for human rights violations, a two-level analysis is necessary to assess:

(1) the bindingness of international human rights obligations of the transferring State in the national decision-making process on arms transfers ("transfer authorization") *at the domestic level*, and

(2) the *extraterritorial* bindingness of human rights obligations by the transferring State outside of its own territory after the weapons have been *delivered* to the recipient's destination.

Let me start with the latter, the more typical example that touches upon the traditional concept of extraterritoriality: This instance assesses whether transferring States have *extraterritorial* obligations stemming from international

human rights treaties towards individuals located outside the transferring State's territory.

In this regard, the obstacle to establishing state responsibility lies in demonstrating the *causal link* between the transfers that have been made by the transferring State and violations of international human rights law which, in the vast majority of cases, were committed by private parties. Exemplified by our case, there is also a *factual* question that seems to be relatively straightforward: How can we trace what happened to the Bundeswehr weapons sold in Iraq's black markets, and how can we identify the responsible actors committing the acts in question that were facilitated by these *delivered* weapons, as well as the victims? Consequently, with respect to attribution, the conduct by non-state actors will principally not be attributable to the transferring State outside its own borders due to lack of *control* (see article 8 of the Draft Articles on State Responsibility).

**A favoured solution for arms transfers…**

However, the claim that is made here is that *the due diligence obligation to prevent* human rights violations should play a *pivotal role* in the regulation of arms transfers, namely in the national authorization processes. Having its roots in the no-harm rule under international environmental law, it remains unclear whether there is an emerging common standard of due diligence that can be applied across various fields of international law (see first report of the ILA Study Group on Due Diligence in International Law of 7 March 2014). In the area of human rights, the clearest manifestation of such an obligation is found in the jurisprudence of the Inter-American Court of Human Rights (IACtHR) which stated: "*an illegal act which violates human rights and which is initially*

*not directly imputable to a State (…) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation (…)*" (IACtHR, Velasquez Rodriguez Case, Judgment of July 29, 1988, para. 172).

Nevertheless, does Germany's due diligence obligation to prevent human rights violations extend beyond its own borders? The potential harm will likely ultimately occur outside of the territory of that State. Arguably, the due diligence obligation is understood in a manner that it is a "territorial" obligation, rather than an "extraterritorial" one. The due diligence obligation is "relocated" to an earlier point for binding Germany to take preventive measures at the source, where it (still) exercises control over the weapons that are supposed to be delivered. Hence, this makes such an obligation quite an attractive approach regarding arms transfers, because it avoids the problem of attribution, as mentioned above. Notably, there are interesting analogies that support the point that actions subject to due diligence obligation lie "at home" and not "abroad": for example preventing the cross-border movement of terrorists (see S/RES/2178 (2014) of 24 September 2014), or the duty of "non-refoulement" under refugee law.

What exactly is covered by the due diligence obligation to prevent human rights violations? Apart from the requirement of the existence of a *substantial risk* that violations of human rights might occur, the threshold of the due diligence obligation consists of a *variable* standard oriented towards the *capacity* to act on behalf of the transferring State. This includes a *reasonableness test* by that State in view of the appropriate measures that have to be taken in order to prevent that risk (see also ICJ, Bosnia and Herzegovina v.

Serbia and Montenegro, Judgement of February 26, 2007, para. 430).

**The "procedural" dimension of the due diligence obligation**

How can such an obligation be operationalized in the context of arms transfers? The procedural duty to take effective preventive measures entails risk assessments, similar to environmental impact assessments, which have to be conducted in the national authorization processes. The EU Council Common Position 2008/944/CFSP of 8 December 2008 specifies the content of such assessments in providing a range of legal and political parameters that have to be taken into account. These are, among others, the internal situation of the recipient country, human rights, the risk of diversion, and the preservation of regional peace, security and stability. An end-user certificate ("*Endverbleibserklärung*"), as obtained by Germany from the KRG, as well as the training mission for the Peshmerga by German soldiers, might be a "right" step in this direction. Nevertheless, as we have seen, their functionality is limited. Where serious human rights violations by all parties involved in the conflict have widely occurred, such as in Iraq, (this was quite predictable in Germany's case, see e.g. here), an appropriate measure would be the *denial* of such transfers (although I accept that the threat posed by ISIL is quite a strong counterargument). Yet, States should not by way of arms transfers delegate military action to uncontrollable third parties, as they could arguably have to take other measures of foreign policy towards international peace and security.

In conclusion, the due diligence obligation for the field of arms transfers proposed here allows one to internalize international human rights norms into the national decision-

making process and to harmonize the assessment of such authorizations – there are already other cases in progress (see e.g. here).

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ISSN 2510-2567

**Tags:** *Armed Conflict*, *Do No Harm*, *Extraterritoriality*, *Human Rights*



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